

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEVERN L. HERRINGTON, F/K/A,
LORI L. HERRINGTON,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:15-CV-00141-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 17, 23. Attorney Joseph M. Linehan represents Severn L. Harrington (Plaintiff); Special Assistant United States Attorney Jennifer A. Kenney represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on November 8, 2010, alleging disability since September 1, 2004, due to depression, social anxiety, identity confusion, multiple personality disorder, arthritis in the knees, irritable bowel syndrome, memory loss, obesity, high cholesterol, and anger

1 management. Tr. 139-147, 157, 168. The application was denied initially and
2 upon reconsideration. Tr. 103-106, 109-111. Administrative Law Judge (ALJ)
3 Lori L. Freund held a hearing on August 26, 2013, and heard testimony from
4 Plaintiff and vocational expert K. Diane Kramer. Tr. 36-81. Plaintiff was
5 represented by counsel. *Id.* The ALJ issued an unfavorable decision on October
6 22, 2013. Tr. 20-31. The Appeals Council denied review on April 14, 2015. Tr.
7 1-6. The ALJ's October 22, 2013, decision became the final decision of the
8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
9 405(g). Plaintiff filed this action for judicial review on May 29, 2015. ECF No. 1,
10 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 20 years old when she applied for SSI. Tr. 139. Plaintiff
16 completed the twelfth grade without special education courses. Tr. 158. She has
17 never worked. Tr. 151-154.

18 At the hearing, Plaintiff testified that she experiences pain in her left foot if
19 anything touches her last two toes, difficulty sitting down for long periods of time,
20 nervousness or anxiety in crowds, knee pain, allergies, difficulty getting out of bed,
21 difficulty with her memory, abdominal cramping after eating, and exercise induced
22 asthma. Tr. 49, 52-55, 61-63, 65, 69, 75. She further testified that she hears voices
23 and on average she stays in her room all day. Tr. 68, 70-71. Plaintiff further
24 testified that she would prefer to be a male, but that due to her health, she could not
25 proceed with any transitional procedures. Tr. 71.

26 **STANDARD OF REVIEW**

27 The ALJ is responsible for determining credibility, resolving conflicts in
28 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
 2 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
 3 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
 4 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
 5 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 6 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 7 another way, substantial evidence is such relevant evidence as a reasonable mind
 8 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 9 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 10 interpretation, the court may not substitute its judgment for that of the ALJ.
 11 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 12 evidence will be set aside if the proper legal standards were not applied in
 13 weighing the evidence and making the decision. *Browner v. Secretary of Health*
 14 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 15 supports the administrative findings, or if conflicting evidence supports a finding
 16 of either disability or non-disability, the ALJ's determination is conclusive.
 17 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

18 **SEQUENTIAL EVALUATION PROCESS**

19 The Commissioner has established a five-step sequential evaluation process
 20 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
 21 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 22 proof rests upon the claimant to establish a *prima facie* case of entitlement to
 23 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
 24 claimant establishes that physical or mental impairments prevent her from
 25 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If a claimant
 26 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
 27 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
 28 other work, and (2) specific jobs exist in the national economy which the claimant

1 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
2 (2004). If the claimant cannot make an adjustment to other work in the national
3 economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

4 ADMINISTRATIVE DECISION

5 On October 22, 2013, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since November 8, 2010, the date of application. Tr. 22.

9 At step two, the ALJ determined Plaintiff had the following severe
10 impairments: dysthymic disorder; somatoform disorder; gender identity disorder;
11 social anxiety; and personality disorder. Tr. 22.

12 At step three, the ALJ found Plaintiff did not have an impairment or
13 combination of impairments that met or medically equaled the severity of one of
14 the listed impairments. Tr. 23.

15 At step four, the ALJ assessed Plaintiff’s residual function capacity and
16 determined she could perform a range of work at all exertional levels with the
17 following nonexertional limitations:

18 [S]he would be limited to simple, routine, and repetitive tasks; she
19 would work best away from the general public but could have
20 occasional interaction with co-workers that did not involve tandem
21 tasks; she would require a low-stress work environment; she could not
22 perform at a production-rate pace but could complete work during a
23 regular shift; she should only be required to perform occasional
24 decision-making; and she could tolerate no more than occasional
25 changes in the workplace.

26 Tr. 25-26. The ALJ concluded that Plaintiff had no past relevant work. Tr. 29.

27 At step five, the ALJ determined that, considering Plaintiff’s age, education,
28 work experience and residual functional capacity, and based on the testimony of
the vocational expert, there were jobs that exist in significant numbers in the

1 national economy Plaintiff could perform, including the jobs of Laundry Worker,
 2 Dishwasher, Advertising Material Distributor, and Laboratory Sample Carrier. Tr.
 3 30. The ALJ concluded Plaintiff was not under a disability within the meaning of
 4 the Social Security Act at any time from the date of application, November 8,
 5 2010, through the date of the ALJ's decision, October 22, 2013. Tr. 30.

6 ISSUES

7 The question presented is whether substantial evidence supports the ALJ's
 8 decision denying benefits and, if so, whether that decision is based on proper legal
 9 standards. Plaintiff contends the ALJ erred by (1) failing to accord proper weight
 10 to the opinions of Dennis Pollack, Ph.D., Kayleen Islam-Zwart, Ph.D, and Rita
 11 Zorrozuva, LICSW, and (2) failing to properly consider Plaintiff's testimony about
 12 the severity of her symptoms.

13 DISCUSSION

14 A. Medical Opinions

15 Plaintiff argues that the ALJ failed to properly consider and weigh the
 16 medical opinions of Dennis Pollack, Ph.D., Kayleen Islam-Zwart, Ph.D, and Rita
 17 Zorrozuva, LICSW. ECF No. 17 at 11-13.

18 In weighing medical source opinions, the ALJ should distinguish between
 19 three different types of physicians: (1) treating physicians, who actually treat the
 20 claimant; (2) examining physicians, who examine but do not treat the claimant;
 21 and, (3) nonexamining physicians who neither treat nor examine the claimant.
 22 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
 23 weight to the opinion of a treating physician than to the opinion of an examining
 24 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
 25 should give more weight to the opinion of an examining physician than to the
 26 opinion of a nonexamining physician. *Id.*

27 When a treating physician's opinion is not contradicted by another
 28 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.

1 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
 2 physician's opinion is contradicted by another physician, the ALJ is only required
 3 to provide "specific and legitimate reasons" for rejecting the opinion of the treating
 4 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
 5 an examining physician's opinion is not contradicted by another physician, the
 6 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
 7 F.2d at 830. When an examining physician's opinion is contradicted by another
 8 physician, the ALJ is only required to provide "specific and legitimate reasons" for
 9 rejecting the opinion of the examining physician. *Id.* at 830-831.

10 The specific and legitimate standard can be met by the ALJ setting out a
 11 detailed and thorough summary of the facts and conflicting clinical evidence,
 12 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
 13 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
 14 conclusions, she "must set forth [her] interpretations and explain why they, rather
 15 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
 16 1988).

17 **1. Dennis Pollack, Ph.D.**

18 On December 5, 2011, Dr. Pollack completed a consultative examination,
 19 which included the administration of a Mental Status Examination, a Trails
 20 Making Test, and a Wechsler Memory Scale-III. Tr. 333-338. Dr. Pollack
 21 diagnosed Plaintiff with gender identity disorder, somatoform disorder and
 22 personality disorder. Tr. 337-338. Additionally, he provided a rule out diagnosis
 23 of depressive disorder and anxiety disorder. Tr. 338. Dr. Pollack provided the
 24 following statement:

25 Ms. Herrington has many medical complaints which affect her.
 26 Seemingly, more important is the sexual identify [sic] issue. She would
 27 like to have a sex change as she sees herself as a male rather than
 28 female. However, because of her high cholesterol her physician

1 recommends against making changes in her hormones. She is
2 depressed about her situation. She feels trapped by her body. She has
3 fallen into a pattern which she avoids socializing and spends most her
4 day playing video games and sleeping. She is preoccupied with
5 physical complaints. She suffers from depression and anxiety, the
6 extent of which needs to be clarified.

7 Tr. 337. The ALJ found that “Dr. Pollack did not provide an assessment of the
8 claimant’s residual functional capacity, but the [ALJ] assigns his diagnoses
9 significant weight as he evaluated the claimant in person and his conclusions
10 appear to be based on his objective findings.” Tr. 27.

11 Plaintiff fails to assert any error as to the ALJ’s treatment of Dr. Pollack’s
12 examination report. ECF No. 17 at 11-12. The court ordinarily will not consider
13 matters on appeal that are not specifically and distinctly argued in a claimant’s
14 opening brief. *See Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1161
15 n.2 (9th Cir. 2008). The Ninth Circuit explained the necessity for providing
16 specific argument:

17 The art of advocacy is not one of mystery. Our adversarial system relies
18 on the advocates to inform the discussion and raise the issues to the
19 court. Particularly on appeal, we have held firm against considering
20 arguments that are not briefed. But the term “brief” in the appellate
21 context does not mean opaque nor is it an exercise in issue spotting.
22 However much we may importune lawyers to be brief and to get to the
23 point, we have never suggested that they skip the substance of their
24 argument in order to do so. It is no accident that the Federal Rules of
25 Appellate Procedure require the opening brief to contain the
26 “appellant’s contentions and the reasons for them, with citations to the
27 authorities and parts of the record on which the appellant relies.” Fed.
28 R. App. P. 28(a)(9)(A).¹ We require contentions to be accompanied by
reasons.

¹Under the current version of the Federal Rules of Appellate Procedure, the
appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929-30 (9th Cir. 2003).
2 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
3 “manufacture arguments for an appellant” and therefore will not consider claims
4 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*
5 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to
6 provide adequate briefing, the court declines to consider the issue.

7 **2. Kayleen Islam-Zwart, Ph.D**

8 On May 11, 2012, Dr. Islam-Zwart completed a Psychological/Psychiatric
9 Evaluation form for the Washington State Department of Social and Health
10 Services. Tr. 575-582. Dr. Islam-Zwart diagnosed Plaintiff with major depressive
11 disorder, anxiety disorder, gender identity disorder, and personality disorder. Tr.
12 575, 582. Dr. Islam-Zwart provided the following opinion:

13 Although she did not seem to be clearly malingering, there were
14 indications of trying to magnify the extent of her difficulties. Despite
15 her conclusion that she cannot work, it seems probable that Ms.
16 Herrington could work in the future with access to intervention and
17 appropriate motivation. She indicates use of medication with some
18 recent improvements and should continue to take medication as
19 directed. She would likely benefits [sic] from therapy, especially to
20 address her gender identity problems. ... Once she has achieved better
21 control over her symptoms, vocational counseling and job skills
22 training should be pursued. She might be encouraged to pursue
23 volunteer activities in the meantime to give her some work experience.

24 Tr. 582. The ALJ gave “great weight” to Dr. Islam-Zwart’s opinion. Tr. 28.
25 Plaintiff argues that Dr. Islam-Zwart’s opinion precluded work; therefore, the ALJ
26 erred by not finding Plaintiff disabled based on the opinion. ECF No. 17 at 12.

27 Dr. Islam-Zwart’s opinion does not constitute an opinion as to Plaintiff’s
28 residual functional capacity. Dr. Islam-Zwart did not identify any work functions
or limitations Plaintiff may have with specific work functions. Instead, the ALJ
identified that it was Plaintiff’s perception that she could not work and that

1 Plaintiff would be able to work with treatment. Therefore, the ALJ did not error in
2 her treatment of Dr. Islam-Zwart's examination report.

3 **3. Rita Zorrozua, LICSW**

4 Ms. Zorrozua treated Plaintiff since April 17, 2004. Tr. 332. On August 1,
5 2011, she wrote a letter stating the Plaintiff "is very isolated and is avoidant of
6 public situations due to her anxiety. She is further restricted due to her social
7 limitations of presenting as a young man vs. the female person that she is." *Id.*
8 Ms. Zorrozua wrote a second letter on August 28, 2013, in which she stated the
9 following:

10 Politically and socially she has negative thoughts related to the
11 economy and the workforce. Though she did apply [sic] for a couple
12 jobs the fact that she was not called in for interviews also supports her
13 negative thinking about external systems as well as her perception that
14 she is not employable.

15 I have urged her to find out about the resources available through Dept.
16 of Voc Rehab but she continues to find reasons why their services are
17 not going to meet her needs. Her negativity as well as her avoidance
18 prohibit her from engaging in the community at large.

19 Tr. 568. Ms. Zorrozua concluded by stating that "[a]t this time I do not believe she
20 is able to present herself in a positive light regarding a job interview even [if] she
21 were invited to do so." Tr. 567.

22 Ms. Zorrozua provided a third letter on September 19, 2013, in which she
23 identified Plaintiff's diagnosis as social phobia with depression and stated that
24 "Ms. Herrington is not able to work outside the home, hardly leaves the home,"
25 and that "[t]he incapacity makes Ms. Herrington incapable of attempting to find
26 work due to the intensity and nature of her social phobia. The actual process of
27 applying for a position, dealing with co workers and public situations as well as
28 getting to and from a job are overwhelming to Ms. Herrington." Tr. 635. This
third letter was not reviewed by the ALJ prior to penning her decision, but it was

1 viewed by the Appeals Council and associated with the record as part of Exhibit
2 15F. Tr. 4, 35.

3 The ALJ noted that Ms. Zorrozuza's first two letters did not include an
4 opinion that Plaintiff's impairments precluded her from work, and she gave Ms.
5 Zorrozuza's first two letters little weight because there were no counseling records
6 in the file and the letters "appear to be based solely on what the claimant reported,
7 and her allegations are considered less than credible." Tr. 29.

8 Unlike Dr. Pollack and Dr. Islam-Zwart, Ms. Zorrozuza is not an acceptable
9 medical source; instead, she is considered an "other source." See 20 C.F.R. §
10 416.913(d). Generally, the ALJ should give more weight to the opinion of an
11 acceptable medial source than to the opinion of an "other source," such as a
12 therapist. 20 C.F.R. § 416.913(d). An ALJ is required, however, to consider
13 evidence from "other sources," 20 C.F.R. § 416.913(d); S.S.R. 06-03p, "as to how
14 an impairment affects a claimant's ability to work," *Sprague*, 812 F.2d at 1232.
15 An ALJ must give reasons that are germane to each "other source" to discount
16 their opinions. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

17 Plaintiff asserts that the ALJ's finding that Ms. Zorrozuza did not opine that
18 Plaintiff's impairments precluded her from work in the first two letters was
19 inconsistent with Ms. Zorrozuza's statement that Plaintiff would not be able to
20 present herself in a positive light at a job interview. ECF No. 17 at 13. The
21 standard in disability cases is not the capacity to be hired for work, but the capacity
22 to perform work. *Walker v. Mathews*, 546 F.2d 814, 818-819 (9th Cir. 1976). Ms.
23 Zorrozuza did not provide an opinion as to Plaintiff's capacity to perform work in
24 the first two letters. Therefore, the ALJ did not error in her treatment of Ms.
25 Zorrozuza's first two letters.

26 As for Ms. Zorrozuza's third letter, which included a work preclusive
27 opinion, Plaintiff failed to address the Commissioner's treatment of the third
28 opinion by the Appeals Council. Because Plaintiff failed to address this issue in

1 her briefing, it will not be considered by the Court. *See Carmickle*, 533 F.3d at
2 1161 n.2.

3 **B. Credibility**

4 Plaintiff contests the ALJ's adverse credibility determination in this case.
5 ECF No. 17 at 13-15.

6 It is generally the province of the ALJ to make credibility determinations,
7 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
8 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
9 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
10 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
11 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. "General findings are
12 insufficient: rather the ALJ must identify what testimony is not credible and what
13 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

14 The ALJ found Plaintiff less than fully credible concerning the intensity,
15 persistence, and limiting effects of her symptoms. Tr. 27. The ALJ reasoned that
16 Plaintiff was less than credible because (1) the objective medical evidence did not
17 fully support the level of limitation claimed, (2) Plaintiff had an apparent lack of
18 motivation, (3) Plaintiff attempted to magnify her symptoms, (4) Plaintiff
19 attempted to find work during the relevant time period, and (5) Plaintiff's activities
20 were inconsistent with the reported severity of her symptoms. Tr. 27-28.

21 The ALJ's first reason for finding Plaintiff less than fully credible, that
22 Plaintiff's symptoms are not supported by objective medical evidence, is not a
23 specific, clear, and convincing reason to undermine Plaintiff's credibility.

24 Although it cannot serve as the sole ground for rejecting a claimant's
25 credibility, objective medical evidence is a "relevant factor in determining the
26 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
27 F.3d 853, 857 (9th Cir. 2001). In her decision, the ALJ noted that despite alleging
28 disability since 2004, evidence of mental health impairments do not appear until

1 2011 and that her complaints from 2012 to 2013 were mostly physical in nature.
2 Tr. 27-28. While there are not extensive records of mental health treatment in the
3 record, it is obvious that Plaintiff was being treated by Ms. Zorrozuza from 2004
4 and forward. Tr. 332, 568-569. Additionally, there was a psychological evaluation
5 that took place in 2012, and Plaintiff received some counseling into 2012. Tr. 340-
6 341, 575-582. Therefore, the ALJ's rationale for concluding that Plaintiff's self-
7 reports were not supported by objective medical evidence is not supported by
8 substantial evidence and is in error.

9 Plaintiff failed to challenge the remaining reasons the ALJ gave for finding
10 her less than fully credible. ECF No. 17. Therefore, the Court will not consider
11 these remaining issues. *See Carmickle*, 533 F.3d at 1161 n.2.

12 Any error resulting from the ALJ's conclusion that Plaintiff's self-reports
13 were not supported by objective medical evidence is harmless. The ALJ provided
14 additional reasons for finding Plaintiff less than fully credible and Plaintiff failed
15 to challenge these reasons in her briefing. *See Carmickle*, 533 F.3d at 1163
16 (upholding an adverse credibility finding where the ALJ provided four reasons to
17 discredit the claimant, two of which were invalid); *Batson*, 359 F.3d at 1197
18 (affirming a credibility finding where one of several reasons was unsupported by
19 the record); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is
20 harmless when "it is clear from the record that the . . . error was inconsequential to
21 the ultimate nondisability determination"). Therefore, the ALJ's credibility
22 determination is free of any harmful legal error.

23 CONCLUSION

24 Having reviewed the record and the ALJ's findings, the Court finds the
25 ALJ's decision is supported by substantial evidence and free of harmful legal error.
26 Accordingly, **IT IS ORDERED:**

27 1. Defendant's Motion for Summary Judgment, **ECF No. 23**, is
28 **GRANTED.**

2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant** and the file shall be **CLOSED**.

DATED June 28, 2016.



A handwritten signature in black ink, appearing to be "J. Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE